IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-580

PHILLIP M. PROCTOR, ET AL., *Petitioners,*

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This Memorandum is submitted on behalf of Respondents Liberty Mutual Insurance Company, Nationwide Mutual Insurance Company, The Travelers Indemnity Company, Allstate Insurance Company and State Farm Mutual Automobile Insurance Company in opposition to petitioners' request that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia in this matter.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, under the decision of this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), the adjustment and settlement by insurance companies of automobile physical damage claims submitted by or on behalf of policyholders pursuant to their insurance contracts constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act?

2. Whether the Court of Appeals correctly held that summary judgment should be granted and the complaint dismissed with respect to petitioners' allegations of boycott, coercion and intimidation?

COUNTERSTATEMENT OF THE CASE

This was an action by four automobile repair businesses in Virginia and Pennsylvania against five automobile insurance companies.[1] Petitioners alleged in their complaint that the defendant insurance companies had conspired to restrain trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on a method of determining the payments to be made to or on behalf of insureds in settlement of automobile physical damage claims rendered under insurance contracts. As noted by the Court of Appeals, "[a]fter three years of extensive discovery", the petitioners boiled their case down to a relatively simple charge: that the five insurance company defendants "had entered into a horizontal agreement to pay or

[1] The complaint also named as defendants two automobile insurance claims adjusting companies. During the pendency of the appeal, the two adjusting companies entered into a nominal settlement with the plaintiffs and were dismissed from the case.

reimburse their policyholders according to a common formula . . . ." (App., p. 4a.)[2]

On March 17, 1975, after the close of discovery, the defendants filed two motions for summary judgment. The first was based on the petitioners' complete failure, after three years of discovery, to adduce any evidence in support of their allegations of agreement. The second motion argued that, even if the defendants had so agreed, the claims adjustment practices challenged by the petitioners were part of the "business of insurance" and thoroughly regulated by the States of Virginia and Pennsylvania. Thus, defendants contended that, by virtue of the antitrust exemption contained in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, the agreement charged by the petitioners, even if proven, would be outside the scope of the federal antitrust laws, could provide no basis for federal recovery, and could properly be considered only by state officials under state law.

In a comprehensive memorandum opinion issued on December 18, 1975, District Judge Pratt granted the defendants' summary judgment motion based principally on the McCarran-Ferguson Act and ordered the complaint dismissed. (App., pp. 33a-41a.) On June 17, 1977, the United States Court of Appeals for the District of Columbia Circuit, in an extensive opinion by Circuit Judge McGowan, affirmed the District

[2] According to the petitioners, the various insurance companies agreed to utilize "only the prevailing labor rate in adjusting and settling [damage] claims". (App., p. 4a.) As the Court of Appeals noted, the petitioners did not contend that "the different insurance companies had in fact employed a common hourly rate at all times, or agreed to set the hourly rate at a particular dollar amount. . . ." (*Ibid.*)

Court's order (Circuit Judge Wright, dissenting). (*Id.*, pp. 1-32a.) A Petition for Rehearing and Suggestion for Consideration *En Banc* was denied by the Court of Appeals on July 22, 1977.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

In its petition to this Court, petitioners advance two reasons why a writ of *certiorari* should be issued: (i) because the Court of Appeals' decision that the acts charged by the petitioners constituted the "business of insurance" within the meaning of the McCarran-Ferguson Act was allegedly inconsistent with this Court's holding in *SEC* v. *National Securities, Inc., supra;* and (ii) because the Court of Appeals erred in affirming the issuance of summary judgment on the issue of boycott, coercion and intimidation. We respectfully submit that neither of these two arguments affords any basis for the issuance of *certiorari* and review of the Court of Appeals' decision.

I. The Holding by the Court of Appeals That the Claims Settlement Practices in Issue Below Constitute the "Business of Insurance" Within the Meaning of the McCarran-Ferguson Act Was Correct as a Matter of Law and Clearly Consistent With This Court's Holding in *SEC* v. *National Securities, Inc.*

Contrary to petitioners' assertion that the Court below acted inconsistently with the decision of this Court in *National Securities,* the Court of Appeals recognized that any analysis of the scope of the "business of insurance" exemption to the antitrust laws in the McCarran-Ferguson Act "must begin" with this Court's decision in *SEC* v. *National Securities, Inc., supra.* (App., p. 7a.) The Court of Appeals noted that, in *National Securities,* this Court held that the scope

of the antitrust exemption afforded in the McCarran-Ferguson Act "was not intended to cover all of the activities of the insurance companies. . . ." (*Id.*, p. 9a.) Instead, as the Court of Appeals found, this Court in *National Securities* established the following standard for determining when the conduct of any insurance company fell within the "business of insurance" exemption in the McCarran-Ferguson Act:

> "Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. Certainly the fixing of rates is part of this business . . . . The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute . . . *The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder."* *SEC* v. *National Securities, Inc., supra,* 393 U.S. at 459-60, cited at App., pp. 9a-10a. (Emphasis supplied in Court of Appeals' decision.)

Applying this standard, the Court of Appeals held that the challenged practices here fell within each of the elements of the "business of insurance" identified by this Court in *National Securities*:

> "Applying this standard to the facts before us, we have little doubt that what appellants have characterized as the 'core' of their case, the al-

leged horizontal agreement to pay insureds' claims on the basis of the prevailing labor rate, as well as appellees' supposed adherence to a common formula to compute damage estimates, fits within the 'core' of the 'business of insurance.' The essence of the automobile insurance contract is the insurance company's agreement, in ret[ur]n for a premium, to make payments to or on behalf of the policyholder for losses arising out of the ownership, maintenance, or use of an automobile. *The determination by the insurance company of the amount to be paid in discharge of this contractual obligation is at the heart of the relationship between insurer and insured, and is directly connected with the reliability, interpretation, and enforcement of the insurance contract.*" (App., p. 10a.) (Emphasis supplied.)

The Court of Appeals held that, for the above reasons, the alleged horizontal agreement by insurance companies to establish a common formula in the adjustment and settlement of claims, even if proved by the petitioners, fell directly within the "business of insurance" as defined by this Court in *National Securities* and thus was subject to state, not federal, regulation.[3]

The Court of Appeals further held that the same conclusion followed with respect to petitioners' allegation that, pursuant to the alleged horizontal agreement, individual insurance companies had entered into vertical agreements with so-called "preferred shops" since these alleged vertical agreements were also "con-

[3] There was no dispute below that the matters in issue were extensively subject to regulation within the meaning of the McCarran-Ferguson Act under the insurance codes and other statutes by Insurance Commissioners and others in the States of Virginia and Pennsylvania, the states where the four plaintiffs resided.

nected closely enough to the contractual relationships between appellees and their policyholders, and with reliability, interpretation, and enforcement of those contracts, to qualify as the business of insurance." (App., p. 11a.) According to the Court:

> "By the very terms of their allegations, appellants concede that these practices stemmed solely from appellees' desire to slow the rate of increase in the claims payments required to satisfy the companies' contractual obligations to their policyholders. Notwithstanding their effect on non-policyholders, the activities unquestionably grow out of, and are tied to, the claims adjustment and settlement process." (App., p. 12a.)[4]

Finally, the Court of Appeals noted that a finding that the acts alleged by the petitioners constituted the "business of insurance" was supported by the close relationship between the amounts paid by insurance companies to settle claims and insurance rates. As the Court of Appeals noted, "in a case involving similar activities, the Third Circuit concluded that the substantial impact on rates . . . was sufficient to satisfy the statutory standard, based on the language in *National Securities* to the effect that the business of insurance includes 'other activities of insurance companies [which] relate so closely to their status as reliable insurers.'" *Travelers Insurance Co.* v. *Blue Cross,* 481 F.2d 80, 82-83 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973). (App., pp. 13a-14a.) Based on undisputed facts below, the Court of Appeals held the relationship between amounts paid to settle physi-

[4] As the Court noted, "the fact that a practice may affect other types of business is not dispositive of whether it is sufficiently related to the business of insurance to come within the McCarran Act's protection." (App., p. 11a.)

cal damage claims and insurance rates was clearly present in the instant case:

> "Of central significance in this entire context is the close relationship between the cost of reimbursement [of] damage claims, on the one hand, and the insurance rates charged by appellees, on the other. Any doubt as to whether these activities should be deemed to fall within the business of insurance is ponderably eased by that economic reality." (App., p. 13a.)

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals that the acts in issue constituted the "business of insurance" within the meaning of the McCarran-Ferguson Act was clearly correct and wholly consistent with this Court's opinion in *SEC* v. *National Securities.*[5] Accordingly, no basis exists for review by this Court.

II. The Decision by the Court of Appeals That Summary Judgment Should Be Granted With Respect to Petitioners' Allegations of Boycott, Coercion and Intimidation Was Correct and Wholly Consistent With This Court's Prior Holdings

The second reason advanced by the petitioners as to why this Court should review the Court of Appeals' decision is that the Court of Appeals improperly sus-

[5] The petitioners' suggestion that confusion exists with respect to the application of *National Securities* is without merit. The lower courts have uniformly applied the standards set forth in *National Securities* with differences in result being based on the specific facts of each case. *See, e.g., Workman* v. *State Farm Mut. Automobile Ins. Co.*, Civil No. 75-1799 (N.D. Cal. Sept. 16, 1976); *Frankford Hospital* v. *Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976); *Anderson* v. *Medical Service*, 1976-1 Trade Cases ¶ 60,884 (E.D. Va. 1976); *Royal Drug Co., Inc.* v. *Group Life & Health Insurance Co.*, 556 F.2d 1375 (5th Cir. 1977).

tained the dismissal of the complaint with respect to petitioners' allegations of boycott, coercion and intimidation. Under the McCarran-Ferguson Act, the antitrust exemption does not apply to those antitrust violations which are carried out by acts of boycott, coercion and intimidation. 15 U.S.C. § 1013(b).[6] Circuit Judge McGowan, writing the majority opinion, held that the District Court had properly reviewed the undisputed facts in the record and concluded that there was no factual basis for any kind of boycott, coercion or intimidation and that summary judgment should be granted and the complaint dismissed. The petitioners, quoting extensively from Circuit Judge Wright's dissenting opinion, contend that the majority's conclusion with regard to this issue was incorrect.

We respectfully disagree and believe that the decision of the majority of the Court of Appeals was clearly correct. Indeed, contrary to petitioners' assertions, that decision was wholly consistent with this Court's decisions on the proper role of summary judgment in complex antitrust cases.

[6] The issues raised in this case with respect to the boycott exemption in the McCarran Act are in no respect like those raised in *Barry* v. *St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3 (1st Cir. 1977), *cert. granted*, 46 U.S.L.W. 3293 (Oct. 31, 1977). In *Barry*, the First Circuit defined the scope of the boycott, coercion and intimidation exemption in the McCarran-Ferguson Act more broadly than had other Courts of Appeals. The issue raised by the petition for *certiorari* before this Court in *Barry* is whether the definition of boycott, coercion and intimidation adopted by the First Circuit or by other Courts of Appeals is correct. The proper definition of the boycott exemption to the McCarran-Ferguson Act is not in issue in this case. (Indeed, the Court below decided the issue in petitioners' favor and gave the petitioners the benefit of the broadest definition of boycott for purposes of analysis.)

As Circuit Judge McGowan acknowledged in the majority opinion, under the decisions of this Court "caution must be used in granting summary judgment in complex antitrust actions . . . ." (App., p. 28a.)[7] However, as Circuit Judge McGowan further recognized, this Court held in *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968)—a case not even cited by petitioners to this Court—that the use of summary judgment is available and appropriate under proper circumstances in antitrust cases. (*Ibid.*) As this Court noted in *Cities Service:*

> ". . . Rule 56(e) should [not], in effect be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations . . . . While we recognize the importance of preserving litigants' rights to a trial on their claims, *we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.*" (App., p. 28a.) (Emphasis supplied.)

Circuit Judge McGowan in his opinion carefully reviewed the undisputed factual material in the record, as had the District Court, and concluded, under the *Cities Service* test, that this was an appropriate case for the issuance of summary judgment with respect to the question of boycott, coercion and intimidation. The Judge noted that petitioners' "own deposition testi-

[7] *See Poller* v. *CBS, Inc.*, 368 U.S. 464 (1962); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962).

mony shows that during the relevant time period each [of the named petitioners] in fact transacted business with policyholders of most, if not all, of the insurance companies presently before us." (App., p. 29a.) According to the Judge:

> ". . . the absence of a complete refusal to deal did make it all the more important, if . . . [petitioners] wished to survive summary judgment, for them to come forward with some additional evidence tending to prove a tacit or express boycott agreement among appellees." (App., p. 29a.)

Circuit Judge McGowan found that petitioners had not come forward with the missing evidence of a boycott. Indeed, as noted by the Judge, the so-called review of the documentary evidence in the record which made up most of the petitioners' argument before the District Court and brief to the Court of Appeals on this issue did not create any material issues of fact or controvert the conclusion that summary judgment was proper:

> "Appellants have devoted most of their brief to a rambling description of the documents in the record which, in their view, create a genuine issue of fact with respect to the boycott claim. But, try as they might, they have been unable to point to any evidence whatsoever, in a ten-volume record supplemented by several boxfuls of materials compiled during three years of extensive discovery, that supports the existence of a contract, combination, or conspiracy among appellants to boycott noncooperative shops." (App., p. 29a)[8]

[8] Judge McGowan further noted that arguments of a conspiracy based on alleged parallel conduct were unavailing since the acts complained of were in the "independent self-interest of each individual insurance company which adopted them, regardless of

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals granting summary judgment on the issue of boycott, coercion and intimidation was wholly correct and fully consistent with this Court's opinions on the proper role of summary judgment in antitrust cases.

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what the other insurance companies decided to do . . .", so that the alleged evidence offered by the petitioners of parallel conduct did "not in any way tend to establish a boycott agreement, tacit or otherwise." (App., p. 30a.)

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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